Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 19___

NO. 77-789

CARL ZABY, THOMAS ZABY, REGINALD SIGUR, MITCHELL MATCHABIE, ANGELA ZABY DE MARCO and ROSE ZABY McMULLEN,

Petitioners

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA, SECOND DISTRICT

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IN THE

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_____ TERM, 19___

CARL ZABY, THOMAS ZABY, REGINALD SIGUR, MITCHELL MATCHABIE, ANGELA ZABY DE MARCO and ROSE ZABY McMULLEN,

Petitioners,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA, SECOND DISTRICT

The Petitioners above-named respectfully pray that a writ of certiorari issue to review the judgments of the Court of Appeal of the State of California, Second District (located at the address set forth in the proof of service which accompanies this petition).

OPINIONS AND ORDERS IN THE COURTS BELOW

All petitioners herein were originally indicted together, on a common set of allegations, which ultimately came before the same state appellate court by way of two appeals, which were decided as follows:

(1) On July 11, 1977, the California Court of Appeal, Second District, filed its opinion affirming judgments of conviction of Petitoners Carl Zaby, Thomas Zaby, Reginald Sigur, and Mitchell Matchabie, in 2d Criminal Case No. 29105. (see appendix)

(2) On July 11, 1977, the California Court of Appeal, Second District, filed its opinion affirming judgments of convictions of Petitioners Angela Zaby DeMarco and Rose Zaby McMullen, in 2d Criminal Case No. 27984. (see appendix)

(3) On September 8, 1977, the California Supreme Court filed its order denying the petitions of the petitioners herein for a hearing. (see appendix)

JURISDICTION

The jurisdiction of this court is invoked under Title 28, U.S. Code, Section 1257 (3).

QUESTIONS PRESENTED

(1) When law enforcement officers, having a suspect under arrest at his residence, induce him to believe that he may be released if he gives permission for a general search of his residence,

thereby obtaining such permission, may a trial court thereon make a finding that consent was given, and hold that the consequent search, otherwise unlawful, did not violate the Fourth and Fourteenth Amendments?

(2) When a guilty plea has been induced by a court-approved plea-bargain, whereby the prosecutor agrees to confine himself on the issue of penalty to commenting on the probation officer's report, may the prosecutor, disagreeing with a favorable probation report, then put into evidence police opinions that the defendants are guilty of numerous uncharged crimes, and, further, may such evidence be used against the defendants even though the police refuse to disclose the alleged sources of their opinions?

STATEMENT OF THE CASE

Petitioners were indicted in the County of Los Angeles, State of California, on charges of Receiving Stolen Property, Conspiracy to Receive Stolen Property, Attempt to Receive Stolen Property, and Solicitation to Commit Burglary.[1/]

1/ The pertinent statutory provisions, none of which is in issue herein, are: California Penal Code Sections 182.1 (Conspiracy), 496 (Receiving Stolen Property), 653f (Solicitation) and 664 (Attempted Felony).

A detailed statement of the assignment of the various charges among the defendants, which matter is not in issue herein, is set forth in the opinions of the California Court of Appeal, reproduced in the appendix hereto.

(1) Evidence of Consent:

On April 14, 1975, all petitioners made a pre-trial oral motion to suppress evidence seized by Los Angeles County Sheriff's deputies in a search of the residence of Petitioner Carl Zaby and other petitioners, on the ground that evidence which was indispensible to the indictment and to the trial was seized as a result of a search which violated petitioners' rights under the Fourth Amendment and under California State law not herein involved.[2/]

The prosecutor contended that the search, which was without a warrant and in which a four-bedroom home was ransacked, was with the consent of Petitioner Carl Zaby, who, Petitioners concede, had the necessary actual and ostensible authority.

Before the search, a shoplifter had made a "controlled sale" to one or more Petitioners herein of a paper bag-full of purportedly-stolen toothpaste and cold tablets, at Zaby's market, next to which stood the residence which was later subjected to a general search. The bag of toothpaste and cold-pills was found in plain view in the market, and a few of the items were found on a table in the kitchen of the residence. Consent for the recovery of these items was sufficiently established.

2/ Petitioners' Motion to Suppress is noted at Pp. 40-61 (Proceedings) and P. 83 (Motion Denied) of the Clerk's Transcript, and the People's Written Opposition is set forth at Pp. 76-81 of the Clerk's Transcript.

After the "controlled sale" the market was entered by twelve to fourteen officers with weapons drawn. Everyone in the market was arrested and taken to the county jail, with the exception of Petitioner Carl Zaby. The search of the residence, in which numerous items of allegedly stolen property were seized, later being presented in support of the indictment, commenced at about 2:00 p.m. and continued until about 2:00 a.m. of the following day.

The officer in charge of the operation required Petitioner Carl Zaby to accompany him as he went about the premises, and from time to time asked him if he could examine specific items, for example, the bag of toothpaste and cold pills, and a watch and some canned meat which were displayed in the market, and from time to time Petitioner answered, "fine". It was clear that the officer intended a general search of the market and the residence for all possible evidence of crimes, but that he did not reveal this intent to Petitioner. When the officer began to explore the residence, Petitioner requested and was granted permission to call his attorney. This development occurred about 4:30 p.m. Petitioner's attorney testified that Petitioner told him that his store and residence were being overrun by the officers. The attorney did not arrive until 8:00 p.m. Meanwhile, by telephone, the attorney asked the officers whether or not Petitioner was going to jail, to which the officer in charge replied,

> "And I told him at that point that I hadn't determined whether he was going to jail, but his attitude was fine. And he [the attorney] said, 'Fine. I have instructed him to be cooperative.'"

Earlier in the search, the officer stated to Petitioner that he wanted to look around for armed persons, to which Petitioner had replied, "fine" and, thereafter, the officer said that he wanted to look around for stolen property, but that Petitioner did not reply. The only other gesture of obtaining consent was the officer's request that Petitioner accompany him, to which Petitioner said, "Yeah."

Arguing the suppression motion of the trial court, the prosecutor said,

> "Now, in my opinion, that is a broad consent [referring to the officer's statements, which Zaby never answered, that he would like to look around for stolen property] and entitles everything that followed to be legal, <u>in spite of the fact that I don't think Carl Zaby realized how detailed or how long of a search was about to follow from that</u>, . . ."
>
> (Emphasis supplied)

(2) Sentencing Procedures:

On May 20, 1975, after the suppression motions were denied, Petitioners Carl Zaby, Thomas Zaby, Reginald Sigur and Mitchell Matchabie entered into a plea-bargain with the prosecutor, who represented to them at that time,

> (1) Your sentence will be determined entirely by the judge, at the sentencing hearing.
> (2) The Probation Officer will make a report.
> (3) At the hearing, your attorneys will be heard.
> (4) "And I will have a chance to argue what should happen to each of you."
> (5) "At that time the judge will decide." 3/

Sentencing was set for June 26, 1975. The Probation Officer's reports (Supplemental Clerk's Manuscript Pp. 1-237) noted that Petitioners were, for all practical purposes, devoid of prior criminal records and recommended

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3/ On May 20, 1975, there was a severance of proceedings as to Petitioners Angela Zaby DeMarco and Rose Zaby McMullen. Those petitioners raise the illegal search and seizure but do not raise the issue of denial of due process in sentencing.

that probation be granted without imprisonment. The prosecutor thereupon obtained a continuance, and on August 11, 1975 presented, through testimony, the opinions of Captain Searcy, a divisional commander of the Los Angeles Police, and Sergeant Gailey, a vice and gambling specialist in the same police force, that Petitioners Carl and Thomas Zaby, with lesser involvement by other petitioners, were the center of a bookmaking ring which grossed $35,000.00 per week and were the principal agency for the "fencing" of stolen property in a large area of central Los Angeles. Petitioner Carl Zaby was said to be the "master-mind".

Aside from some suspicions which were generated by surveillance of Zaby's market, the police information depended on the assertions of various alleged criminal informants, whom the Police described as "Reliable". At the conclusion of the prosecutor's presentation, the defense moved that the identities of the purported informants be disclosed, so as to permit further cross-examination, and possible production and examination of the purported informants. The prosecutor and the police declined to reveal the information, and the trial court denied the defense motion. (Supplemental Reporter's Transcript, August 11, 1975, P. 91).

Several months later a new probation report, written by a different probation officer, was filed. This report, although noting the prosecution evidence of other criminal activity, still recommended against a prison sentence for Petitioner Carl Zaby, although

it did recommend that he be required to serve a period of time in the county jail as a condition of probation. As to the other Petitioners herein the report recommended probation, and the court followed the recommendation; however, it is the position of each Petitioner that the police opinion evidence resulted in a decision by the court to impose more serious punishment than that which would otherwise have been imposed. Petitioner Carl Zaby was sentenced to the state prison, and the other petitioners were granted probation, but with the requirement that Petitioner Thomas Zaby serve a year in jail and that Petitioners Reginald Sigur and Mitchell Matchabie serve 90 days.

ARGUMENT

(1) Consent to Search:

(a) Authorities:

"It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.' [Citations.] It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." (Schneckloth v. Bustamonte (1973) 412 U.S. 218, 219 [36 L.Ed2d 854, 858, 93 S.Ct. 2041].)

The courts have not looked with favor on the practice of substituting consent for the authorization of a

search warrant: "Police must, whenever possible, obtain advance judicial approval of searches and seizures through the warrant procedure." Terry v. Ohio (1968) 392 U.S. 1, 20, 20 L.Ed.2d 889, 88 S.Ct. 1968.

When a prosecutor relies on consent to justify a search, he has the burden of proving that the defendant's "consent was, in fact, freely and voluntarily given." (Bumper v. North Carolina (1968) 391 U.S. 543, 20 L.Ed.2d 797, 88 S.Ct. 1788).

The burden is to establish actual consent by at least a preponderance of the evidence. (U.S. v. Matlock (1974) 415 U.S. 164, 177-178, fn. 14, 39 L.Ed.2d 242, 253-254, 94 S.Ct. 988).

The question of voluntariness is to be determined from the totality of all the circumstances. (Schneckloth v. Bustamonte, supra (1973) 412 U.S. 218, 36 L.Ed. 854, 93 S.Ct. 2041).

". . . the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion were applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." (Schneckloth v. Bustamonte, supra 412 U.S. 218, at 228).

"In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of

the person who consents." (Schneckloth v. Bustamonte, supra 412 U.S. 218, at 229).

Custodial interrogation by the police is inherently coercive. (Miranda v. Arizona (1966) 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, 10 ALR 3d 974).

(b) Discussion:

There was evidence that petitioner Carl Zaby consented to an examination of a few articles which were in plain view; however, "Government agents may not obtain consent to search on the representation that they intend to look only for certain specified items and subsequently use that consent as a license to conduct a general exploratory search." U.S. v. Dichiarinte (C.A. 9th, 1971) 445 F.2d 126, 129.

The heart of the case is the coercion which was implicit in the officer's representation to Petitioner Carl Zaby and his attorney that he could save Petitioner from going to jail if he "cooperated" in the ongoing general search. Petitioners say that consent was negated by that implicit threat and promise, that the showing of consent is not saved by the fact that Petitioner's attorney was overawed along with Petitioner, and that the prosecution showing of consent was, as a matter of law, insufficient. The situation, a householder under arrest, the officers telling him that they may not put him in jail if he cooperates, was too coercive for the consequent search to be permitted. The situation was fully comparable to that in Bumper v. North Carolina,

supra, where the court said, at Page 550 of 391 U.S.

> ". . . the situation is instinct with coercion--albeit colorably lawful coercion. Where there is coercion there cannot be consent."

Petitioners are entitled to an order directing the California court to suppress and return all evidence, other than the toothpaste and cold pills, which was seized by virtue of the warrantless search of the residence.

(2) Sentencing:

Due process must be observed at all critical stages of the proceedings, and this court has held that sentencing is a critical stage. (Mempa v. Rhay (1967) 389 U.S. 128, 19 L.Ed.2d 336, 88 S.Ct. 254.

Fundamental unfairness in a sentencing procedure, for example, where the defendant had no attorney, or where the court made incorrect assumptions concerning the defendant's record, violates the Fourteenth Amendment. (Townsend v. Burke (1948) 334 U.S. 736, 92 L.Ed. 1690, 68 S.Ct. 1252. It is Petitioners position that the refusal of the police to state the alleged sources of their claims, and the refusal of the trial court to order disclosure, did render the instant proceeding fundamentally unfair

within the intent of Townsend v. Burke.

It is true —at least where the prosecutor's information appeared to be reliable— that this court has declined to disapprove a sentencing procedure in which the prosecuting attorney, in an unsworn statement, set forth details of the defendant's past crimes and of the crime for which he was sentenced, despite the loss of the defendant's right of cross-examination (Williams v. Oklahoma (1959) 358 U.S. 576, 3 L.Ed.2d 516, 79 S.Ct. 421, Reh. den. 359 U.S. 956, 3 L.Ed.2d 763, 79 S.Ct. 737; Williams v. New York (1949) 337 U.S. 241, 93 L.Ed. 1337, 69 S.Ct. 1979). It has also declined to disapprove a sentencing procedure in which a government agent testified to reliable hearsay information of other, uncharged, offenses. (Taylor v. U.S. (1950) C.A. 9th Wash. 179 F.2d 640, Cert. Den. 339 U.S. 988, 94 L.Ed. 1389, 70 S.Ct. 1010). But it has not yet permitted the prosecuting attorney or the testifying police agent simultaneously to allege such information and to decline to state its source.

This court has held that federal juvenile proceedings, where a district court certified a juvenile for adult prosecution, required observance of due process. (Kent v. U.S. (1966) 383 U.S. 541, 560-562, 16 L.Ed.2d 84, 86 S.Ct. 1045). Also, in Specht v. Patterson (1967) 386 U.S. 605, 18 L.Ed.2d 326, 87 S.Ct. 1209, this court held that a psychiatric evaluation of a defendant, considered by a trial court

without a proper hearing, including the element of confrontation, violated the due process clause.

The California Courts have, at times, been excessively indulgent to violations of due process in sentencing procedures, even, for example, where the trial court has obviously based a choice of a more severe sentence on speculation and conjecture: See People v. Vatelli (1971) 15 Cal.App.3d 54, 64; Trial court, learning that defendant had thirteen prior convictions, stated that it assumed that he had committed 130 burglaries, "since you don't get caught every time."

In the instant case a California trial court has followed, and the California appellate courts have declined to correct, a procedure in which the prosecutor induced the accused to plead guilty on a promise, little short of express, that he would limit himself on the issue of sentence to argument on the probation officer's report, where the prosecutor then violated his plea bargain by presenting evidence where the evidence consisted of police opinions which were based on hearsay sources, and where the police and the prosecutor even declined to identify their purported sources.

Obviously, the sentences imposed herein were not selected merely on the basis of the offenses to which Petitioners pleaded guilty. The violation of the plea bargain gave the state an unfair advantage, and the unfairness was compounded by the use of secret

sources of purported information. Petitioners Carl Zaby, Thomas Zaby, Reginald Sigur and Mitchell Matchabie are entitled to an order directing the California court to permit them to withdraw their pleas of guilty, or, at their option, to be re-sentenced without regard to undisclosed sources of governmental claims of other, uncharged, criminal activities.

Wherefore, Petitioners pray that this court issue its writ of certiorari to the California Court of Appeal, Second District, to resolve the issues stated hereinabove.

Dated: November 29, 1977

Fred Kilbride

FRED KILBRIDE
Attorney for Petitioners
CARL ZABY, THOMAS ZABY,
REGINALD SIGUR, MITCHELL
MATCHABIE, ANGELA ZABY DE MARCO
and ROSE ZABY McMULLEN

ORDERS MADE IN THE COURTS BELOW

CLERK'S OFFICE, SUPREME COURT,
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

SEP 8 1977

I have this day filed Order

REHEARING DENIED

In re: 2 Crim. *No.* 29105

People

vs.

ZABY, et al.

Respectfully,

G. E. BISHEL
Clerk

80487-877 4-77 3M OSP

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

SEP 8 1977

I have this day filed Order

HEARING DENIED

In re: 2 Crim. *No.* 27984

People

vs.

DeMarco et al.

Respectfully,

G. E. BISHEL
Clerk

90487-877 4-77 3M OSP

OPINIONS OF THE COURTS BELOW

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CARL ZABY, THOMAS ZABY, REGINALD SIGUR, and MITCHELL MATCHABIE, Defendants and Appellants.	2d Crim. No. 29105 (Super. Ct. No. A 311556)

Appeals from judgments of the Superior Court of Los Angeles County. Earl F. Riley, Judge. Affirmed.

Negata and Masuda, and Jed Quinn Beebe, for Defendants and Appellants.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, S. Clark Moore, Assistant Attorney General, Juliet H. Swoboda and Shunji Asari, for Plaintiff and Respondent.

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In an indictment, defendants Carl Zaby, Thomas Zaby, Reginald Sigur, and Mitchell Matchabie were accused in count 1 of conspiracy to receive stolen property in counts 2 through 11, Carl Zaby was accused of receiving stolen property; and in count 14, Carl Zaby, Thomas Zaby, and Mitchell Matchabie were accused of attempt to receive stolen property.[1]

Motions by defendants to dismiss certain counts of the indictment were denied, except that Matchabie's motion to dismiss count 14 was granted. Their motions to quash search warrants and to suppress evidence were denied.

Carl Zaby withdrew his plea of not guilty to counts 1, 7, and 11; and he pleaded guilty to those counts. Sigur, Matchabie, and Thomas Zaby withdrew their pleas of not guilty to count 1; and each one pleaded guilty to that count. Sugsequently, the motion of each defendant to withdraw his plea of guilty was denied. Carl Zaby was sentenced to state prision for the term prescribed by law

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on counts 1, 7, and 11; and probation was granted as to the other defendants. Each defendant appeals from the judgment against him.

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1 Other defendants indicted were Angela Zaby De Marco and Rose Zaby McMullen. Those defendants are appellants in People v. De Marco et al., 2d Crim. No. 27934

Appellants filed an opening brief, and after a substitution of counsel, filed an amended opening brief. Contentions therein are in substance that the trial court erred in denying their motions to suppress evidence and the motions to withdraw the pleas of guilty; they could not be guilty of "conspiracy to commit a non-existent crime"; there was prejudicial misconduct by the prosecutor; the trial judge was biased; and the court erred prejudicially in hearing third party claimants regarding rights to the stolen property prior to sentencing the defendants.

On August 19, 1974, Barbara Hurt, who was arrested for stealing cold-medicines and toothpaste from a drugstore,[2] told officers that she had been stealing Contacs, Excedrin, aspirin, ham, cigarettes, liquor,

(page 4)

crystal, and steaks from stores, and that three or four times a day she would take the stolen merchandise to Zaby's Market and sell it to Carl Zaby. On seven occasions she had been arrested for shoplifting; and on each occasion she telephoned Carl Zaby for bail. He told her that since she "stole so well," he would buy a car for her so that she could get around more quickly to get Contacs -- he said that he wanted 16 dozen Contacs a day. He bought a car for her.

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2 Factual statement is based on evidence at the motion to suppress evidence. Portions of the grand jury transcript were received in evidence at the hearing of that motion.

On August 20, 1976, Hurt went to Zaby's Market with an undercover Officer Henderson. In a bag she took Contacs and toothpaste which she had stolen from the drugstore. (Before she entered the market, another officer (Reed) marked the packages of Contacs and tubes of toothpaste with a yellow pencil.) In the market, she gave the bag to Willie Thomas who counted the articles which were in the bag and called out the quantities to Carl Zaby. Defendant De Marco, who was present, asked Hurt when she (Hurt) was going to get two coats from Wards or Sears for De Marco's grandchildren.

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Hurt asked Thomas for money for the articles which were in the bag. Carl Zaby said, $10." She (Hurt) said that she "almost got busted" getting the Contacs. Then Willie Thomas obtained $15 from Thomas Zaby and gave the money to Hurt.

Hurt left the market and told officers, including Officer Reed, what had occurred. She also said that in the market there were guns and dangerous people who would use the guns. Then Officer Reed and other officers entered the market. Officer Reed displayed his badge, identified himself, and detained the persons in the market. On a counter where Hurt said the Contacs and toothpaste were placed, he saw toothpaste and the Contac packages which he had marked with the yellow pencil.

Thomas Zaby told Officer Reed that Carl Zaby was in charge. Officer Reed told Carl Zaby that the

officers were investigating stolen property and the receiving of stolen property. The officer advised Carl Zaby of his Miranda rights; and Carl Zaby said that he understood his rights and did not need an attorney. Then the

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officer said that the market had purchased stolen property and that he wished to examine and retrieve the property. Carl also said that he would be glad to cooperate and that he did not know anything about the stolen property.

The officer asked Carl whether he (officer) might look at certain merchandise that he saw while he was talking with Thomas Zaby -- merchandise on which there were labels such as Thriftimart, Sav-On, Drug King, and Clark. Carl Zaby replied that he would cooperate. Then the officer seized the Contacs and some of the toothpaste that Hurt had taken into the market.

The officer saw guns near the counter in the market. He also saw living quarters behind the counter. Because Hurt had told him (Officer Reed) that the persons in the store would use the guns, he told Carl Zaby that he was concerned about the guns and who might use them, and he asked Carl whether anyone was in the living quarters behind the counter. Carl replied: "Look around. I'll be cooperative. I don't have anything to hide."

Officer Reed asked Carl to accompany him; and

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they went into the living quarters. In the kitchen the officer saw some tubes of toothpaste that had the same labels as the labels on the toothpaste which Hurt took into the market. He examined the tubes and saw the pencil markings he had put on them.

Officer Reed then said that he would like to look for stolen property upstairs. Carl Zaby telephoned his attorney, and the officer stood by the telephone. The attorney instructed Carl to cooperate with the officers. Then the officer searched the upstairs area and found defendants De Marco and McMullen in a bedroom. Near the counter of the market officers found several shotguns and revolvers. They also found large quantities of watches, appliances, and clothes on which there were labels of other stores, large quantities of steaks and canned ham bearing labels of other markets, and cigarettes and liquor stored in bulk in the living quarters.

Appellants contend that the court erred in denying their motion to suppress evidence. They argue that although Carl Zaby's words "may be construed as a consent to the search," the officers did not advise Carl

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of his right to counsel and did not advise defendants that they had a right to withdraw the consent; that the search was not justified by the "supporting evidence" (affidavits for issuance of two search

warrants);[3] and that the search of the living quarters was not incident to "the controlled sale of stolen property."

In reviewing the determination of the trial court upon a motion to suppress evidence, the function of this court is to determine whether there was substantial evidence to support the findings. (People v. Waters, 30 Cal.App.3d 354, 359 [106 Cal.Rptr. 293].) As the trier of fact, the superior court adjudges credibility of the witnesses (People v. West, 3 Cal. 3d 595, 602 [91 Cal.Rptr. 385, 477 P.2d 409]), and all factual conflicts must be resolved in the manner most favorable to the court's disposition on the motion. (People v. Martin, 9 Cal.3d 687, 692 [108 Cal.Rptr. 809, 511 P.2d 1161].)

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As to asserted duty of an officer to advise a defendant that he has a right to refuse permission to enter and search premises, it has been said (People v. James, 19 Cal.3d 99, 115 [___Cal.Rptr.___, ___ P.2d ____]: "In a long line of decisions beginning at least a decade ago [citation], the Courts of Appeal developed a rule that a waiving of the right to refuse permission to search is not a precondition of a valid consent." (See People v. Roberts, 246 Cal. App. 2d 715, 728-729 [55 Cal.Rptr. 62]; People v.

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[3] Apparently there were two search warrants. No search warrant or affidavit for issuance of warrant has been included in the record on appeal.

DeStrulle, 28 Cal.App.3d 477, 482 [104 Cal.Rptr. 639].)

In the present case, when the officers entered the market, Thomas Zaby said that Carl Zaby was in charge; an officer told Carl that they were investigating stolen property; the officer advised Carl of his Miranda rights; Carl said he understood his rights and did not want an attorney; the officer said he wished to examine stolen property purchased by the market; Carl said he was glad to cooperate; the officer asked whether he could look at certain merchandise; Carl replied that he would cooperate;

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the officer saw guns near the counter and living quarters behind the counter; the officer was concerned about the guns, and asked Carl whether anyone was in the living quarters; Carl replied: "Look around. I'll be cooperative. I don't have anything to hide"; the officer and Carl went into the living quarters where the officer saw some of the stolen merchandise; the officer said that he would like to look upstairs for stolen property; Carl telephoned his attorney, who instructed him to cooperate with the officers; and the officer went upstairs and found the defendants in a bedroom. Under the circumstances, the trial court could properly find that voluntary consent was given to search of the market and the living quarters. The court did not err in denying the motion to suppress evidence.

In further argument with reference to their contention that the court erred in denying the motion to suppress evidence, appellants assert that the search warrants were based upon observations and seizures made during a warrantless search and that the warrants were

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not justified by such supporting evidence. The evidence with reference to the warrantless search and seizure was as above stated regarding Officer Reed's entering the market and receiving consent of Carl Zaby to search the premises. As hereinabove concluded, that search was made properly pursuant to consent voluntarily given. Thus the observations and seizures during that search were proper.

Each appellant contends further that the court erred in denying his motion to withdraw his plea of guilty in that he did not understand the meaning of "conspiracy," and because the pleas were a family package whereby Carl Zaby made the plea decisions for the codefendants "in his role as head of the family and employer," and Carl Zaby "indicated" that he was influenced by the ill health of his sisters and the prospect of putting them as well as himself and his codefendants through long and painful trial.

The motions to withdraw the guilty pleas were submitted on the notices of motion, declarations by defendants, points and authorities and oral argument.

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Carl Zaby's declaration stated in part: "[B]eing lacking in education, I could not understand the legal basis"; and the thought of dragging his sisters, brothers and employees through a three or four month trial weighed heavily on him until he "felt that the only way out was the most expedient way, to just plead guilty and get it over with," even though he knew he was innocent.

Thomas Zaby's declaration stated that "[N]ot being an educated man, [he] was thoroughly confused by the nature of the charges"; he had a deep and abiding faith in his family; he felt tremendous anxiety over "this upset" his family was suffering; he decided to plead guilty to relieve that feeling of anxiety and "get it over with"; and he supposed that his anxieties would diminish as soon as the matter was over.

Matchabie's declaration stated that when his employer (Carl Zaby) and the family decided to change their pleas to guilty, he "felt in a very strange circumstance, since [he] did not know what had transpired, and did not understand the charges that were being made against us . . ."

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Sigur's declaration was similar to Matchabie's declaration. No testimony was presented at the hearing of the motion; and there was no declaration or statement by counsel for defendants as to advice

given to defendants at the time the pleas were made.[4]

Section 1018 of the Penal Code provides that on application of the defendant at any time before judgment the court may for good cause shown permit a plea of guilty to be withdrawn. The granting or denial of such application is within the trial court's discretion (People v. Waters, 52 Cal.App.3d 323, 328 [125 Cal.Rptr. 46], and denial thereof may not be disturbed on appeal unless the trial court has abused its discretion. (In re Brown, 9 Cal.3d 679, 685 [108 Cal.Rptr. 801, 511 P.2d 1153].)

In the present case, the trial court did not abuse its discretion in denying the motions to withdraw

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the pleas of guilty. It is to noted further that each appellant in effect attacks validity of the pleas,[5] and he did not obtain a certificate of probable cause. (See Pen. Code, § 1237.5; Cal. Rules of Court, rule 31, subd.(d); People v. Ribero, 4 Cal.3d 55, 63-64 [92 Cal.Rptr. 692, 480 P.2d 308]; People v. Nigro, 39 Cal.App.3d 506, 510 [114 Cal. Rptr. 213].)

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[4] Appellants refer to testimony given by a probation officer and the Zaby sisters (defendants in companion case) at a hearing of a petition for writ of error coram nobis; however, that hearing occurred approximately two months after the motions to withdraw the pleas of guilty were denied.

[5] Cf. People v. Kaanehe, 19 Cal.3d 1, 8 [___ Cal Rptr. ___, ___P.2d___].

Appellants contend further that there was prejudicial misconduct by the prosecutor in that he referred (at the hearing of the motion to suppress evidence) to testimony presented before the grand jury. Portions of the testimony before the grand jury were received in evidence at the hearing of the motion. References thereto were proper. Defendants pleaded guilty; and thus no evidence was presented on the issue of guilt. This contention is without merit.

Appellant Carl Zaby contends that the trial judge was "predisposed to the case" in that he did not

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consider the recommendation in the probation report that Carl's application for probation be granted, and did not consider that this was Carl's "first offense." Granting or denial of probation was a matter within the trial court's discretion. The trial court did not abuse its discretion in denying probation as to Carl Zaby.

Appellant's contend further that the trial judge was "predisposed" in that he refused to disqualify himself. On the last day of the probation-and-sentence hearing, defendants requested that the trial judge ask another judge to preside, because the trial judge allegedly had made an out-of-court statement that the probation report was a "whitewash." Appellants also assert that prejudice on the part of

the judge was indicated by his statement regarding the request for another judge. That statement was: "And, lastly, I congratulate you [defense counsel] on your ability to read minds because you are assuming that what you have done has made absolutely no difference in the idea that the Court had when it read the probation report initially, and that is a fact not yet

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in evidence. You may proceed. The motion is denied for the purpose of the record."

The matter of probation and sentence was called for hearing in June 1975, and the ruling thereon was made in May 1976. During that eleven-month period, the court permitted substitution of defense counsel, and took evidence for nine days. The court read the probation reports, and granted probation as to all of the defendants in this action, except Carl Zaby. (Also, probation was granted to Carl's sisters [De Marco and Mullen] in the companion case.) The court did not err in denying defendant's motion, made on the last day of the probation-and-sentence hearing, that the judge disqualify himself.

Appellants contend that the court erred prejudicially in hearing third-party claimants regarding rights to the alleged stolen property prior to sentencing defendants. They argue that section 1408 of the Penal Code only permits such claims "against the person accused of stealing or embezzling it," and therefore the section does not apply herein because

it does not mention a person

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accused of receiving stolen property.[6] They also assert that since section 1408 of the Penal Code provides for such claims "at any time after the final determination of the action or proceedings," they cannot be heard prior to sentencing.

In the present case the court permitted claimants to make claims to ownership of the seized property which had been seized by the officers; however, the court did not make any finding of ownership adverse to any defendant. The record shows that the claims of ownership

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were withdrawn. The court's actions with reference to the claims did not constitute prejudicial error.

The judgments are affirmed.

WOOD, P.J.

We concur:

THOMPSON, J.

HANSON, J.

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6 Section 1408 of the Penal Code provides:

"On the application of the owner and on satisfactory proof of his ownership of the property, after reasonable notice and opportunity to be heard has been given to the person from whom custody of the property was taken and any other person as required by the magistrate before whom the complaint is laid, or who examines the charge against the person accused of stealing or embezzling it, shall order it to be delivered, without prejudice to the state, to the owner, on his paying the necessary expenses incurred in its preservation, to be certified by the magistrate. The order entitled the owner to demand and receive the property."

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ANGELA ZABY DE MARCO and ROSE ZABY McMULLEN, Defendants and Appellants.	2d Crim. No. 27984 (Super. Ct. No. A 311556)

Appeals from judgments of the Superior Court of Los Angeles County. Earl F. Riley, Judge. Affirmed.

Charles M. Berg for Defendants and Appellants.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, S. Clark Moore, Assistant Attorney General, Juliet H. Swoboda and Shunji Asari, Deputy Attorneys General, for Plaintiff and Respondent.

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In count 1 of an indictment, defendants Angela Zaby De Marco and Rose Zaby McMullen and other defendants[1] were accused of conspiracy to receive stolen property (Pen. Code, §§ 182.1, 496); in count 12 Angela De Marco was accused of solicitation to commit burglary (Pen. Code, § 653f); and in count 13 Rose McMullen was accused of solicitation to commit burglary. Their motions to set aside the indictment, to quash a search warrant, and to suppress evidence were denied. Each defendant [De Marco and McMullen] withdrew her plea of not guilty, and pleaded guilty to count 1. Each one was sentenced to county jail for one year; sentence was suspended; probation was granted; and, upon motion of the People, the other counts were dismissed.

Each defendant appeals from the judgment (order granting probation) in her case, and contends that (1) the court erred in denying the motion to suppress evidence,

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(2) she could not be guilty of "conspiring to commit a non-existent crime," and (3) the court abused its discretion in denying her petition for writ of error coram nobis, wherein she sought an order setting

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[1] In the 14-count indictment, other defendants were Carl Zaby, Thomas Zaby, Mitchell Matchabie, and Reginald Sigur. Those defendants are appellants in People v. Zaby, et al., 2d Crim. No. 29105.

aside her plea of guilty.[2]

[Discussion of search and seizure issue, deleted here, is identical to discussion of the same issue in the same case, reprinted in this appendix, hereinabove, at pages 3-9.

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Appellants contend further that they "cannot be guilty of conspiring to commit a non-existent crime." They argue that "There can be no crime to receive property which is not stolen." In effect, appellants' argument is that the offense of receiving stolen property was not committed, and therefore they could not be guilty of conspiracy to receive stolen property.

As above stated, each appellant appeals from a judgment on her plea of guilty. By entering such plea, she admitted each element of the offense

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[2] On August 11, 1975, each defendant filed a notice of appeal from the "judgment of conviction" entered July 29, 1975, and stated that the ground for appeal was the "denial" of the motion to suppress evidence. Approximately two months after filing those notices of appeal, defendants petitioned the superior court for writ of error coram nobis, to set aside the pleas. After that petition was denied, each defendant filed (on December 5, 1975) an "amended notice of appeal" from the "judgment of conviction" entered August 11, 1975, and stated the grounds for appeal were denial of the motion to suppress evidence, [denial] of motion for continuance, denial of petition for writ of error coram nobis, and denial of equal protection of the law "because no work furlough program for women."

charged (People v. Stanworth, 11 Cal.3d 588, 605 [114 Cal.Rptr. 250, 522 P.2d 1058); no other proof was necessary (People v. Warburton, 7 Cal.App.3d 815, 821 (86 Cal.Rptr. 894]);

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and the judgment entered upon such plea is not reviewable on the merits. (Id.) Because each defendant admitted sufficiency of the evidence by pleading guilty, she cannot properly question the sufficiency evidence on appeal.

Each appellant contends that the trial court erred in denying her petition for writ of error coram nobis, wherein she sought an order setting aside her plea of guilty. Each petition was filed more than two months after each petitioner had filed a notice of appeal from the judgment in her case. Each petition alleged in substance that petitioner pleaded guilty by reason of representations by her counsel that the jury would not believe her defense, and that she plead guilty because there was a "package deal" with her brothers and sisters.

In People v. Haynes,270 Cal.App.2d 318 [75 Cal. Rptr. 800], defendant (pp. 318-319) filed a notice of appeal from the judgment before he petitioned the trial court for writ of error coram nobis. The trial court granted the petition and vacated the judgment. On appeal it was held (p. 320) that the trial court did not have

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jurisdiction to take such action during pendency of the appeal from the judgment.

The judgments are affirmed.

WOOD, P.J.

We concur:

THOMPSON, J.

HANSON, J.